78-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner United States Independent Telephone Association (USITA)[1] respectfully prays that a writ of certiorari be issued to review the opinions and orders of the United States Court of Appeals for the District of Columbia Circuit in this case.

[1] USITA's interest in this case is that of the approximately 1,600 "Independent" (non-Bell) telephone companies of these United States, which serve about 30 million telephones in over half of the served geographical area of the nation; and which, together with Bell System companies, have constructed and operate the integrated nationwide telephone network.

OPINIONS BELOW

The opinions of the Court of Appeals in this case, all captioned *MCI Telecommunications Corp.* v. *F.C.C.*, are:

1. July 28, 1977, reported at 561 F.2d 365 (herein *"Execunet I"*); *cert. den.*, 46 U.S.L.W. 3446, —— U.S. —— (Jan. 16, 1978);
2. April 14, 1978, not yet officially reported (herein *"Execunet II"*);
3. May 8, 1978, not yet officially reported (herein *"Execunet III"*).

These three opinions appear as Appendix I, Appendix D, and Appendix E, respectively, in the separately bound appendix to the petition in this case filed this date by American Telephone and Telegraph Company.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1978, and petitions for rehearing and suggestions for rehearing *en banc* were denied on May 8, 1978. Timely motions for stay pending certiorari were denied by the Court of Appeals on May 11, 1978;[3] and applications for stay were denied by the Court on May 22, 1978.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[2] To avoid burdening the court with unnecessarily duplicative material, USITA will adopt the A. T. & T. Appendix and refer to it herein as "Pet. App."

[3] The lower court did grant stay pending filing and disposition of application for stay to the Circuit Justice.

QUESTION PRESENTED

Whether the court below has once more overstepped the bounds of judicial review and "unjustifiedly [and erroneously] intruded into the administrative process"[4] by judicially ordering (1) continued and expanded competition in the provision of long-distance telephone service and (2) the use of existing telephone company local exchange facilities in furtherance of that competition, all in the absence of the Congressionally mandated public interest findings by the Federal Communications Commission.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended[5] appear as Pet. App. F.

STATEMENT OF THE CASE

In 1971, acting on representations by applicants for authority to offer "specialized" interstate communications services that the services proposed were not available from existing telephone companies, the F.C.C. established a general policy permitting essentially open entry into "the business . . . of providing specialized private or leased line communication services through a microwave transmission facility as distinguished from public exchange and long distance toll telephone service."[6] This distinction and the scope of

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[4] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 46 U.S.L.W. 4301, 4310, —— U.S. —— (April 3, 1978).

[5] 47 U.S.C. 151, *et seq.*

[6] *Washington Utilities & Transportation Com.* v. *F.C.C.*, 513 F.2d 1142, 1155 (9th Cir. 1975); *cert. den.*, 423 U.S. 836 (1975), affirming *Specialized Common Carriers*, 29 FCC 2d 870 (1971), *recon. den.* 31 FCC 2d 1106 (1971).

authorizations granted by F.C.C. pursuant to *Specialized Carriers* were well understood by all concerned, including petitioner below, the original specialized carrier, Microwave Communications, Inc. (MCI). In its "Motion to Strike," filed May 15, 1974 in *Washington Utilities, supra,* MCI argued:

> "Specialized carriers are not authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has ever alleged that they are."

Four months later, in September 1974, MCI filed with the Commission a tariff offering metered use service, a service subsequently advertised and promoted by MCI as "Execunet". The Execunet tariff was twice rejected by the Commission as an unauthorized duplication of ordinary long distance telephone service.[7]

In *Execunet I, supra,* the court below in essence found that although the Commission considered only the services proposed in the application before it, and may have thought it was granting MCI only the authority it sought, *i.e.,* to provide only private line services,[8] the statute under which the Commission has been operating for over 40 years permits limitations on grants only under the "terms and conditions" clause of Section 214(c), and only on an adequately supported affirmative finding that the public interest re-

[7] *MCI Telecommunications Corp.,* 60 FCC 2d 25 (1976) and Appendix B (letter order, 1975).

[8] In the court's words, "We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision" *Execunet I,* 561 F.2d at 378, Pet. App. 25i.

quires limitations.[9] Finding further that the Commission's *Specialized Carrier* decision "cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required 'private line' restrictions," the Court below held that MCI's authorizations were unrestricted.[10] Next addressing the question of the provision by MCI of "Execunet" service, the court's words were:

> ". . . we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings."[11]

Execunet I thus "reversed and remanded," with expressions of concern and words of caution to the Commission that in the court's view FCC had not so far determined that A T & T should be granted a *de jure* monopoly in the long distance telephone field, and therefore should draw no public interest inferences from the fact that another carrier's proposed services would compete in that field.[12]

[9] *Execunet I,* 561 F.2d at 377, Pet. App. 23i. Section 214(c) of the Communications Act (47 U.S.C. 214(c)), which the court thus construed, provides in pertinent part that:

> "The Commission shall have power to issue such certificate [of public convenience and necessity] as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line . . . described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

[10] *Execunet I,* 561 F.2d at 379, Pet. App. 28i.

[11] *Execunet I,* 561 F.2d at 380, Pet. App. 30i.

[12] *Ibid.*

Motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, were granted and petitions for certiorari, duly filed by USITA, AT&T, and FCC, were opposed by MCI and Southern Pacific Communications Company [13] on the ground, *inter alia,* that review by the Court would be premature, since *Execunet I* "made no ruling on the lawfulness of *Execunet* . . . or between authorized and non-authorized services. All these matters are left for the Commission to decide." [14] The Court denied certiorari on January 16, 1978 (Mr. Justice Stewart and Mr. Justice Powell were recorded as voting for grant).

On February 28, 1978 the Commission, responding to an AT&T "Petition for Declaratory Order," held that its earlier interconnection order,[15] under which Bell System companies were required to interconnect their local exchange facilities with the intercity facilities of the specialized carriers, covered only private line services, not long distance telephone service.[16] In reaching its conclusion, the Commission recognized, as indeed did the Court of Appeals in *Execunet I,* the "very different issue" (from facility authorizations) involved in a Communications Act Section 201(a) interconnection proceeding,[17] where interconnection of

[13] The Solicitor General urged granting of the writ, but reserved his position on the merits.

[14] Nos. 77-420 *et al.*, SPCC Brief in Opposition, pp. 10-11.

[15] *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974); *aff'd. sub nom. Bell Telephone Company of Pennsylvania* v. *F.C.C.,* 403 F.2d 1250 (3d Cir. 1974), *cert. den.,* 422 U.S. 1026 (1975); see also *MCI* v. *A.T.&T.,* 496 F.2d 214 (3d Cir. 1974).

[16] Memorandum Opinion and Order, FCC 78-142, Pet. App. C.

[17] *Execunet I,* 561 F.2d at 378, n.59, Pet. App. 24i-25i.

carrier facilities can only be ordered by the Commission after opportunity for hearing and on an affirmative finding that interconnection is necessary or desirable in the public interest.[18] Acknowledging, as the Court of Appeals in *Execunet I* also pointed out, that there had been no hearings on the issue of competition in the long distance telephone field, and finding that there had been neither notice nor opportunity for hearing on the long distance telephone service interconnection issue, the Commission concluded that it was bound by the Third Circuit's affirmance of the Commission's interconnection order, specifically that court's ruling that the order was not overbroad when construed—as the court did—to cover only private line services.[19]

MCI's reaction to this FCC ruling took the form of a motion to the *Execunet I* court "for an order directing compliance with mandate." The motion was granted by the court below on April 14, 1978 (*"Execunet II"*) with the order being accompanied by a 22-page opinion by Chief Judge Wright, in which is recited "the long series of proceedings and litigation in which MCI has attempted to secure and preserve its

[18] At common law there is no duty on the part of a carrier to physically connect its facilities with those of another carrier. *Atchison, Topeka & S.F. R.R. Co.* v. *Denver N.O. R.R. Co.,* 110 U.S. 667 (1884); *Louisville & Nashville R.R. Co.* v. *West Coast Co.,* 198 U.S. 483 (1904). The interconnection obligation is thus purely a matter of statute, and arises only on Commission order.

[19] Memorandum Opinion and Order, FCC 78-142, February 28, 1978, Pet. App. C. Instructive in this context is the Third Circuit's earlier decision in *MCI* v. *AT&T, supra,* n.15, in which the court vacated a district court ordered interconnection because of uncertainty as to what private line services had been authorized by FCC and to accord to the agency the right to first determine the scope of permissible competition between specialized and existing carriers.

authority to offer Execunet service," the "almost continuous resistance from AT&T," and the "thought that this process finally culminated in our *Execunet* decision upholding MCI's authority to offer Execunet pending further rulemaking by the Commission." [20]

Finding that the Commission's order ". . . twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree," [21] the court below found that although *Execunet I* ". . . is not addressed explicitly to the interconnection issue or to A. T .& T.'s obligation to provide interconnection," [22] "the fact of the matter is that our *Execunet* decision *did* clearly contemplate—by virtue of A. T. & T.'s representations and actions—that A. T. & T. was required to provide interconnection for Execunet service." [23]

Petitions for rehearing and suggestions for rehearing *en banc* were denied by the court below on May 8, 1978. USITA's motion for stay pending certiorari was denied on May 11, 1978, with a ten page *per curiam* (*"Execunet III"*) restating the court's view of MCI's authority to provide long distance telephone service as unlimited and unrestricted, its view of telephone companies interconnection obligations necessarily similarly unbounded, and its determination that MCI's right to enter and to expand its participation in the long distance telephone service market must be allowed to

[20] *Execunet II, slip op.*, p. 3; Pet. App. 2a-3a.

[21] *Execunet II, slip op.*, p. 16, Pet. App. 15a.

[22] *Id.* at 11, Pet. App. 10a-11a.

[23] *Id.* at 10, Pet. App. 9a.

continue ". . . until and unless it was found that the public interest demanded otherwise." [24]

REASONS FOR GRANTING THE WRIT

The Commission's response to the *Execunet I* mandate was the institution on February 28, 1978 of a proceeding [25] to determine the precise question posed by the court below in its *Execunet I* opinion, *i.e.*, "whether competition like that posed by Execunet is in the public interest." [26] It is clear, and the court below agrees, that the Commission has not yet affirmatively made that public interest determination.

In *Execunet II* and *Execunet III*, however, the court below (1) has itself authorized that competition, and (2) has itself ordered existing telephone companies to interconnect their local exchange facilities in furtherance of that competition. In so doing, the lower court has now so far overstepped the permissible bounds of judicial review as to warrant summary reversal.

Indeed, in its trio of *Execunet* decisions the court below has seriously misread the statutes involved, has usurped the Commission's authority to determine the public interest in both grants of authority and interconnection matters, and has precluded responsible exercise of that authority by the agency, all in direct conflict with the Commission's statute, the applicable and

[24] *Execunet II, slip op.*, at 15, Pet. App. 14a.

[25] "*In the Matter of MTS and WATS Market Structure*", CC Docket No. 78-72, Notice of Inquiry (FCC 78-144), adopted February 23, 1978.

[26] *Execunet I*, 561 F.2d at 380, Pet. App. 30i.

controlling decisions of the Court and the interconnection decisions of the Third Circuit.

I. The Court Below Has Far Overstepped The Bounds Of Judicial Review.

That the court below may not have had available to it on April 14, 1978 (the date of *Executet II*) the Court's April 3, 1978 opinion in *Vermont Yankee Nuclear Power Corp.* v. *NRDC* (46 U.S.L.W. 4301) does not excuse or justify its flagrant violation of the standard for judicial review of agency action.

Here, as in *Vermont Yankee,* the agency involved has been given broad regulatory authority, in this case over the development of ". . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." [27] Here, as in *Vermont Yankee,* construction permits and licenses (or certificates of convenience and necessity) must be obtained; and grant by the agency must be based on adequate findings that the public interest, convenience and necessity require or will be served by grant of the authority requested.[28] And here, as in *Vermont Yankee,* the decisions below emanate from the Court of Appeals for the District of Columbia Circuit and thus "will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." [29]

Even without *Vermont Yankee,* however, the standard for judicial review has been well established by the Court in a long line of decisions, including *F.C.C.* v.

[27] Communications Act of 1934, Sec. 1 (47 U.S.C. 151).

[28] *Ibid.*, Secs. 214, 308-309.

[29] *Vermont Yankee, supra,* at 4305, n.14.

Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940); *SEC* v. *Chenery,* 332 U.S. 194, 196 (1947); *F.C.C.* v. *Schreiber,* 381 U.S. 279, 290 (1965); *Burlington Truck Lines* v *U.S.,* 371 U.S. 156, 169 (1972); and *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976). It has been and remains absolutely clear that judicial review of agency action must be based on the agency's action and its rationale. Moreover, as the Court held in *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952), the "function of the reviewing court ends when an error of law is laid bare. At that point the matter goes once more to the Commission for reconsideration." Further, As Mr. Justice Rehnquist, reviewing *Transcontinental, supra,* for the Court in *Vermont Yankee* said:

> "In that case, in determining the proper scope of judicial review of agency action under the Natural Gas Act, we held that while a court may have occasion to remand an agency decision because of the adequacy of the record, the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.' " [30]

Measured by these standards, the decisions below are clearly beyond the pale. For in these decisions the *Executet* court first found error in the Commission's failure to affirmatively find a public interest requirement to limit its authorizations to MCI—a finding obviously impossible in view of the total absence of a record relating to services which MCI had not pro-

[30] *Vermont Yankee, supra,* at 4307.

posed. Had the court below stopped at that point, its decision could have arguably been said to have complied with the judicial review standard, even if its construction of the Commission's statute were erroneous.

But the court below did not stop with laying bare what it viewed as the Commission's error of law. Rather, it gratuitously counselled the Commission in *Execunet I* that it must develop a new record, a record on which a finding could be made that grant of authority for services for which authority was not sought could be found to be not in the public interest. Additionally, the court advised the FCC that no public interest inferences should be drawn from the fact that a proposed service would compete in the long distance telephone field; and that the Commission "must be ever mindful that just as it is not free to create competition for competition's sake,[30] it is not free to propagate monopoly for monopoly's sake;" and that the test is the public interest, "not the private financial interests of those who until now have enjoyed the fruits of *de facto* monopoly." [31]

In *Execunet II,* the court below went still farther afield. It decided there that not only had the Commission erred, but that its failure (in the court's view) to adequately and properly limit MCI to the provision of private line services in fact not only *authorized* MCI to operate its facilities to provide long distance telephone service (Section 214) but also *obligated* the existing telephone companies to interconnect their local facilities in order to help MCI compete in that market (Section 201(a)). Moreover, said the court below, the

[31] *Execunet I,* 561 F.2d at 380, Pet. App. 30i (footnote omitted).

Commission is powerless to stop or contain competition or interconnection in the long distance telephone market until and unless it finds, after completion of the proceeding instituted in compliance with the *Execunet I* mandate, that competition adversely affects the public interest.[32]

Each of these steps beyond the finding of Commission error is, we respectfully submit, an excess of judicial activism warranting summary reversal. *Vermont Yankee, supra,* while specifically and recently directed to the District of Columbia Circuit is not new law. *Pottsville Broadcasting, supra,* quite clearly drew the distinction between a mandate from court to court and court to an administrative agency, (309 U.S. at 141-144) and found that the Court of Appeals, when it had "laid bare [the] error [of the agency], exhausted the only power which the Congress gave it" (309 U.S. at 145). In authorizing competition and requiring interconnections, the court below has ignored the teaching of *Pottsville.* Both functions are quite clearly vested in the agency, not the court; and as the court's mandamus to FCC was set aside in *Pottsville,* so too must the *Execunet* court's usurpation of agency functions be reversed here.

II. Conflicting Decisions Are Not Reconciled By Nullifying One.

The efforts of the *Execunet* court notwithstanding, there remains an unreconcilable conflict between the Third and District of Columbia Circuits. The treatment accorded the Third Circuit's in-depth exploration and resolution of the interconnection issue by the court

[32] *Execunet II, slip op.,* at 15, Pet. App. 14a. MCI has estimated the time required to complete this proceeding to be "several years" (MCI Opposition to Motions for Stay, April 20, 1978).

below can only be described as at best, cavalier, and at worst, rendering wholly without meaning the entire Third Circuit proceeding.

In *Execunet I*, the court distinguished *Bell of Pennsylvania, supra*, on the ground that it "involved a very different issue, namely whether the Commission had affirmatively determined that it would be in the public interest to require A. T. & T. to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970)." [33] In *Execunet II* the lower court "changed positions as nimbly as if dancing a quadrille," [34] and now finds in the Third Circuit's broad construction of *Specialized Carriers, supra*, ". . . strong support—not conflicting authority—for the similarly broad construction we accorded in *Execunet* to *Specialized Carrier* [sic] . . . ." [35]

What the *Execunet* court consistently refuses to acknowledge in either its effort to distinguish or its claim of support is the fact that central to the Third Circuit's interconnection ruling is the basic question of what competitive services MCI had been authorized by FCC to provide. If MCI is indeed the holder of unlimited authorizations and correspondingly unlimited rights to interconnection, as *Execunet II* holds, the Third Circuit's deliberations on the scope of MCI's authorizations were purely academic. The Third Circuit's opinion in *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (3d Cir. 1974) is peculiarly pertinent and in-

[33] *Execunet I*, 561 F.2d at 378, n.59; Pet. App. 24i-25i.

[34] *Vermont Yankee, supra*, at 4306, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 87 (1953).

[35] *Execunet II, slip op.* at 18-19, Pet. App. 17a.

structive here. In that case a preliminary injunction requiring specified interconnections had been issued by the District Court. In vacating the injunction, Circuit Judge Van Dusen, for the court, wrote:

> "Deferral to the FCC under the doctrine of primary jurisdiction is particularly appropriate in this case not simply because of *the fact of uncertainty concerning the issue of what private line services have been authorized*, but also because of the nature of the issue. *For a court to resolve this issue results in a judicial determination of the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T. Such a determination*, involving, as it must, the comparative evaluation of complex, technical, economic and policy factors, as well as consideration of the public interest, *should be made, in the first instance by the administrative agency* which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy." 496 F.2d at 222 (footnote omitted, emphasis supplied).

The result of this decision was *Bell System Tariff Offerings, supra*, which was then affirmed in *Bell of Pennsylvania, supra*.

In the case at bar, FCC did indeed make its determination in the first instance—that it had affirmatively authorized MCI to offer private line service and only private line services. But in *Execunet I* and *Execunet II* the court below made new law—an affirmative FCC authorization pursuant to Section 214(a) [36] of the

[36] Section 214(a) (47 U.S.C. 214(a)) provides in part that:

"No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any

Communications Act cannot be limited to the authority applied for unless FCC conditions its grant pursuant to a separate and additional public interest finding under Section 214(c), and telephone companies interconnection obligation are measured by that same unlimited standard, not by Section 201(a).[37]

The culmination of the Commission's deliberations on how to conduct its affairs under this novel and judicially prescribed procedure, following a three month's freeze on all applications, is a remarkable new routine in which the affirmative finding of public convenience and necessity in each processed application is conditioned on the outcome of the proceeding instituted by the Commission, in response to *Execunet I*, to determine whether the public convenience and necessity require competition in the provision of long distance telephone service.[38]

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line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line. . . ."

[37] Of particular concern to the Independents in this context is the apparent elimination of the requirements of Section 201(a) from the statute, and the denial to the Independents of the right to hearing before the Commission on interconnection matters specifically acknowledged by the Third Circuit. See *Bell of Pennsylvania, supra*, at 1273, n.31a.

[38] How a finding today that the public convenience and necessity require the construction or operation of a new line can be conditioned on the outcome of a proceeding to determine whether the public convenience and necessity require that construction and operation, puzzling at best, is but one result of judicial intrusion into the administrative process. For the Court's convenient reference, a copy of a typical FCC authorization under the new procedure is attached as Exhibit A.

Unlike the Third Circuit, the *Execunet* court, regrettably, did not allow the FCC to conduct the proceeding ordered [39] by *Execunet I* and determine in the first instance ". . . the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T." Rather, by the judicial fiat of *Execunet II* long distance telephone competition is authorized, and interconnection is required, even in the judicially acknowledged absence of any administrative public interest findings as to either authorization or interconnection, and must be permitted to continue and expand "until and unless it was found that the public interest demanded otherwise." [40]

Thus the conflict between the Third Circuit's limited to private line decision and the District of Columbia Circuit's unlimited view remains, and indeed is sharpened by *Execunet II*. The conflict can only be resolved by the Court.

CONCLUSION

Thus has the court below overstepped the bounds of judicial review and usurped the functions of the F.C.C. Thus has the court below reversed the holding in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953) that "*The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard.*" (Emphasis supplied). And thus has the court below reduced the thorough and

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[39] *Execunet I* may be read as leaving the institution of a proceeding to the Commission's discretion. Given the Commission's statutory public interest duty, however, it had no choice but to proceed.

[40] *Execunet II, slip op.* at 15, Pet. App. 14a.

careful deliberations of the Third Circuit to a meaningless semantic exercise, for the entire interconnection proceeding in that court,[41] in which the lawfulness of the FCC order requiring interconnection for MCI's "presently or hereafter authorized" services hinged on its scope, becomes wholly academic if indeed the Execunet court is correct in finding MCI's authorizations unlimited and telephone company interconnection obligations equally unbounded.

For these reasons, the writ should issue to the Court of Appeals for the District of Columbia Circuit, and this case should be set for plenary review.

Respectfully submitted,

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August 7, 1978

[41] *MCI* v. *AT&T, supra; Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974).

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. I-T-C-2621

In the Matter of

WESTERN UNION INTERNATIONAL, INC.

Application for authority to acquire and operate facilities between New York and Washington, D.C.

ORDER AND AUTHORIZATION

Adopted: July 28, 1978

Released: August 1, 1978

1. Opon consideration of the above-captioned application, filed on Oct. 10, 1975 by Western Union International, Inc. (WUI), we find that a grant of said application will serve the public interest, convenience and necessity;

2. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules on Delegations of Authority. That application File No. I-T-C-2621 Is HEREBY GRANTED, explicitly subject to the following: The authorization of the facilities and services herein shall be subject to possible revocation or modification as a result of any findings, rules, requirements or other actions which may result from or be promulgated by, the proceedings in Common Carrier Docket No. 78-72, "In the Matter of MTS and WATS Market Structure," FCC 78-144 (March 3, 1978) or Common Carrier Docket No. 78-96, "Regulatory Policies Concerning the Provision of Domestic Public Message Services By Entities Other Than the Western Union Telegraph Co. and Proposed Amendment to Parts 63 and 64 of the Commission's Rules," FCC 78-184 (March 28, 1978). The grantee is afforded 30 days from the release of this order to decline this authorization as conditioned. Failure to

respond within this period will constitute formal acceptance of the authorization as conditioned;* and

(A) WUI is authorized to:

(1) lease from AT&T and operate 11 voice circuits between its operating offices in New York and Washington, D.C.;

(2) use said facilities to provide those services WUI was authorized to provide by the Commission's Order and Authorization adopted April 8, 1964, File No. T-C-1749 *et al,* as modified by the Commission's Memorandum Opinion, Order and Authorization adopted Dec. 21, 1967, File No. T-C-2135 *et al,* between the United States and over-

* Heretofore, when evaluating whether the public convenience and necessity required the construction and operation of proposed new channels of communications, the Commission believed it sufficient to consider the application "as applied for," i.e. limited to those specific classes of service offerings mentioned in the application or specifically authorized by prior Commission action. However, the Court has recently held that a carrier may introduce new service offerings using existing facilities merely through the filing of appropriate tariffs, unless such use of the facilities has been explicitly restricted based on an adequate public interest determination at the time of authorization. *MCI Telecommunications Corporation* v. *FCC,* 561 F.2d 365 (D.C. Cir. 1977). Pursuant to this legal interpretation, it appears that carriers may now enter and compete in various communications markets, including public message service markets as well as competitive markets from which they were previously precluded, employing both their existing facilities and any additional facilities the Commission may authorize without the requisite limitations based on appropriate public interest fiindings. In order to determine whether the public interest requires any regulatory controls or restrictions on the future market structure for public message telephone and telegraph services, and if so, the nature of any such restrictions, the Commission has instituted CC Docket Nos. 78-72 and 78-96. Pending the results of those proceedings, we believe the public interest requires that we condition all further facility authorizations on their outcome.

seas points WUI is authorized to serve and beyond;

(3) subdivide the voice circuits authorized herein in accordance with the Commission's Memorandum Opinion, Report and Order adopted Feb. 13, 1974, Docket No. 18348;

(B) The Commission's temporary authorizations, granted Sept. 19, and Oct. 20, 1975 and expiring Dec. 31, 1978, authorizing the facilities requested in the instant applications, are hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ JOEL S. WINNIK

for Charles R. Cowan
Chief, Facilities & Services Division